UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

WILLIE DELK, Appellant, v. DEPARTMENT OF THE INTERIOR, Agency.	DOCKET NUMBER DC0752920526-I-1 DATE: JUN - 3 1993

James R. Klimaski, Esquire, Washington, D.C., for the appellant.

Patricia Husted, Esquire, Washington, D.C., for the agency.

BEFORE

Daniel R. Levinson, Chairman
Antonio C. Amador, Vice Chairman
Jessica L. Parks, Member

OPINION AND ORDER

The appellant has petitioned for review of the September 4, 1992 initial decision affirming his 45-day suspension based on the following charges: (1) Conversion of government property for personal use; and (2) violation of the agency's Employee Responsibilities and Conduct regulations. For the reasons discussed below, we find that the petition does not meet the criteria for review set forth at 5 C.F.R. § 1201.115, and we therefore DENY it. We REOPEN this case on our own

motion under 5 C.F.R. § 1201.117, however, and AFFIRM the initial decision as MODIFIED by this Opinion and Order, still SUSTAINING the suspension

BACKGROUND

Suspecting that a number of employees were stealing from its maintenance yard, the agency initiated an investigation of the appellant, the Carpenter Shop Foreman at the yard, and several other employees. *See* Initial Appeal File (IAF), Vol. 1, Tab 3 (subtab 4M); Hearing Transcript (HT) at 37. A District of Columbia Superior Court judge issued a search warrant, supported by an affidavit from an official with the U.S. Park Police (USPP), for a search of the appellant's residence. *See* IAF, Vol. 1, Tabs 3, 9 (subtab 4L). Subsequently, the USPP executed the warrant, and seized a number of items which bore National Park Service markings and labels, as well as an unmarked picnic table, that were relied on by the deciding official in his decision to suspend the appellant. *See* IAF, Tab 9. On appeal, the appellant alleged, as an affirmative defense, that the agency had violated his Fourth Amendment rights by conducting an unlawful search and seizure of his residence. *See* IAF, Tabs 1, 7, 8, and 9.

In his initial decision, the administrative judge sustained the first charge, except as to the picnic table, which he found was not government property. *See* IAF, Tab 16, Initial Decision (ID) at 2-4. He also sustained the second charge, except with respect to its reference to that portion of the agency regulations requiring agency employees to

protect and conserve government property. See ID at 4-5. Although he found that the magistrate had a substantial basis upon which to find probable cause to issue the search warrant for the appellant's home, the administrative judge found that the USPP's search exceeded the scope of the warrant.[1] *See* ID at 7-9.

However, citing *Middleton v. Department of Justice*, 23 M.S.P.R. 223 (1984), *aff'd*, 776 F.2d 1060 (Fed. Cir 1985) (Table), the administrative judge found that the exclusionary rule did not bar the agency's use of illegally seized evidence in an administrative proceeding where the evidence had been seized by law enforcement officers for use in a criminal proceeding since suppression would not have had any deterrent effect. *See* ID at 11. The administrative judge found that there was no support for the appellant's contention that the exclusionary rule applies to administrative, non-criminal

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[1] The warrant issued by the magistrate authorized the search of the appellant's premises for the possible seizure of a "National Park Service picnic table and a new poured concrete patio." *See* IAF, Vol. 1, Tab 3 (subtab 4L). Although the affidavit supporting the warrant described the ongoing theft of agency tools and other material, the administrative judge found that the warrant did not authorize a search for, or the seizure of, such items because the affidavit had not been incorporated into the warrant. *See* ID at 9. Furthermore, he found that where the warrant is "*narrower* than the affidavit requesting that warrant, those executing it must act on the assumption that the magistrate meant to limit the scope of the search." *Id.* Therefore, the administrative judge found that the warrant authorized the USPP to search for only two things: a National Park Service picnic table and a newly poured concrete patio. Thus, he concluded that all of the items as to which he had sustained the agency's charges were seized by the agency during an unreasonable search, conducted in violation of the Fourth Amendment. *See* ID at 11.

proceedings such as appeals to the Board. *Id.* Consequently, after reassessing the penalty but finding it reasonable, he affirmed the agency's action. *See* ID at 12-15.

ANALYSIS

In his petition for review, the appellant conterds only that the administrative judge incorrectly found that the exclusionary rule does not apply in administrative proceedings. *See* Petition for Review (PFR) at 8-15. The appellant argues that, since exclusion of the seized evidence would have had a deterrent effect upon the USPP, the administrative judge should have applied the exclusionary rule. *Id.* We disagree.

We find that the Supreme Court's decisions regarding the application of the exclusionary rule to proceedings other than criminal prosecutions do not provide a basis on which to extend the exclusionary rule to Board proceedings. *See Immigration and Naturalization Service v. Lopez-Mendoza*, 468 U.S. 1032 (1984); *United States v. Janis*, 428 U.S 433 (1976), *United States v. Calandra*, 414 U.S. 338 (1974); *One 1958 Plymouth Sedan v. Commonwealth of Pennsylvania*, 380 U.S. 693 (1965). In *Janis*, the Court noted that "[i]n the complex and turbulent history of the [exclusionary] rule, the Court never has applied it to exclude evidence from a civil proceeding, federal or state." *Janis*, 428 U.S. at 447. This statement continues to be valid, as the Court has failed to apply the exclusionary rule to any post-*Janis* civil cases.

We find that the exclusionary rule is inapplicable because, although the Court has found that the exclusionary rule is likely to be most effective when applied to "intrasovereign" violations of the Fourth Amendment,[2] such as the violation in this case, the USPP officers who expanded the search beyond the terms of the search warrant, the "offending officers" who are the objects of deterrence, were engaged in a criminal investigation. USPP officers devote most of their attention to protecting U.S. park property from abuse by private citizen park users. Generally, their "zone of primary interest" is certainly not investigation of employee malfeasance. In fact, it was only after USPP began investigating the disappearance of a great deal of NPS property from the Brentwood maintenance facility that a determination was made that it was most probably NPS employees who were responsible for the disappearance. Even if a determination had been made that non-government employees were responsible for the theft of this property, the USPP would have continued its investigation.

As the administrative judge concluded in the initial decision, the "zone of primary interest" of the USPP officers from the beginning of the investigation to the discovery of

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[2] Intrasovereign violations are those in which the sovereign that unlawfully obtained the evidence is also the one that seeks to use it. *See Janis*, 428 U.S. at 454-56. Further, the Court has stated that the primary issue to be addressed in determining whether the exclusionary rule applies to a specific type of civil (including administrative) proceeding is the determination of the "zone of primary interest" of the offending officers. *See id.* at 458.

government property on the premises of the appellant remained a criminal investigation, the evidence was seized with the intention of pro[illegible] criminal charges against the appellant, and the USPP in fact did attempt to use the evidence as support for a criminal charge against him. The United States Attorney, however, declined to prosecute a criminal charge against the appellant.

In this case, application of the exclusionary rule would not punish the USPP, nor significantly deter USPP officers from future unlawful conduct. It is the appellant's supervisors, and the NPS itself that would be punished. There would be no deterrence value, since the agency officials who initiated the removal action played no role in the unlawful conduct (there was nothing unlawful with regard to the investigation which led to the search).

As this case exemplifies, and the Supreme Court's failure to apply the rule beyond criminal cases demonstrates, the "marginal deterrence value" of suppressing the illegally seized evidence in administrative proceedings is significantly less than is the case with respect to criminal cases, and the exclusionary rule therefore should not be applied in Board proceedings. In fact, it is in cases which involve government employees, where the primary purpose of the exclusionary rule, the deterrence of police misconduct, is not well served, that "society's interest in maintaining levels of integrity and fitness of its public servants far outweigh any possible

interest protected." *Turner v. City of Lawton*, 733 P.2d 375, 383 (Okla. 1986) (Simms, C.J., dissenting).

Consequently, we find that the administrative judge correctly admitted the illegally seized items as evidence. Accordingly, the agency's action is sustained.

ORDER

This is the final order of the Merit Systems Protection Board in this appeal. 5 C.F.R. § 1201.113(c).

NOTICE TO APPELLANT

You have the right to request the United States Court of Appeals for the Federal Circuit to review the Board's final decision in your appeal if the court has jurisdiction. *See* 5 U.S.C. § 7703(a)(1). You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. *See* 5 U.S.C. § 7703(b)(1).

FOR THE BOARD:

Robert E. Taylor
Clerk of the Board

Washington, D.C.